89-1657

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DUANE JOSEPH TILLIMON,

Petitioner,

VS.

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JOHN G. RUST, ESQUIRE
833 SECURITY BUILDING
TOLEDO, OHIO 43604
(419) 243-9191

Attorney for Petitioner

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Appendix has been mailed by ordinary United States mail to Dean P. Mandross, Lucas County Prosecutor's Office, Lucas County Courthouse, Toledo, Ohio, 43624, this 13th day of February 1990.

John G. Rust
Attorney for Petitioner

C. A. NO. L-88-253

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

State of Ohio

APPELLEE

vs.

Duane Tillimon

APPELLANT

Filed

June 9, 1989

APPEAL FROM

LUCAS COUNTY

COMMON PLEAS COURT

NO. CR 88-5607

DECISION AND
JOURNAL ENTRY

This matter is before the court on appeal from the Lucas County Court of Common Pleas. Appellant, Duane Tillimon, was found quilty of violating R.C. 2907.05 (A) (3), gross sexual imposition, in connection with fondling the genitalia of a sever-year-old boy in the rest room on McDonald's restaurant. Appellant appeals from his convicion with three assignments of error:

"FIRST ASSIGNMENT OF ERROR
The trial court erred in failing to grant Appellant's motion for mistrial and motion for new trial on the basis

that the mentioning twice of Defendant's willingness or unwillingness to take a lie detector test consititued reversible error.

"SECOND ASSIGNMENT OF ERROR
The trial court committed reversible error and abused its discretion in permitting a child under the age of ten (10) to testify.
"THIRD ASSIGNMENT OF ERROR
The verdict of the jury and judgment of the trial court should be reversed on the basis that the verdict and judgment were against the manifest weight of the evidence."

Appellant's first assignment of error addresses the trial court's refusal to grant a mistrial after the prosecutor made a reference to Tillimon being asked if he would take a lie detector test. At trial, two references to a lie detector were made. The first reference occurred when the father of the victim testified for the state. The father was being questioned about his confrontation of Tillimon outside the rest room. The father had stopped Tillimon and accused him of molesting his son. Security was summoned. Officer Hilt arrived and began speaking to the father and Tillimon.

The father testified as follows:

Q Now, you indicated that the Defendant told you [before Officer Holt arrived] that all he did was snap your son's pants, correct?

"A Right.

"Q Was there a point in time while you're in this hallway where he changes his story or he admits to doing other things?

"MR. NEWCOMER: Objection. He can ask what he stated. He's characterizing it. He can ask what the conversation was.

"THE COURT: I'm not sure I understand the distinction.

"MR. NEWCOMER: He's characterizing testimony right now, and I think he should just ask the question as to what he said.

"THE COURT: All right.

"Q (By Mr. Mandross) Tell the jury what else Mr. Tillimon said during the course of the conversation with you and the officer?

"A I told the officer waht had happened and what my son had told me in the bathroom, and Mr. Tillimon said all I did was snap his pants. I didn't touch the kid, and I said you're a lying lying son of a bitch because I saw you. I was standing behind you, and then he says, oh, I did tuck his shirt in. I'm sorry, I did tuck his shirt in and then I snapped his pants, and by then--

then he told me he was going to excuse me for making such an accusation and started getting a little heated argument there, and Officer Holt got between us and said just calm down, we'll figure this all out later. You're going to end up taking a lie detector test, and he said I'm not taking nothing unless he takes one first, and I said I don't have a problem with it, and at that point there --

"MR. NEWCOMER: Your Honor, I'll move to strike that testimony." (Emphasis added.)

The second reference to a lie detector test was made when the prosecutor was cross-examining Tillimon.

"Q Now, at the point where you're confronted by Mr. Hernandez and he told you of his accusations, you realize that he had in fact seen you doing something with his son, correct?

"A He asked me if I tucked his son's shirt in.

"Q The question is --

"A Yeah, he saw me tuck in his son's shirt.

"Q And you realize that after he approached you and what he said?

"A Right.

"***

"Q And it's your testimony that in the presence of Mr. -- or Officer Holt you indicated that you would take a lie detector test, or there was some talk about taking a lie detector test?

"MR NEWCOMER: Your Honor, can we approach the bench?

"THE COURT: Yes.

"(Thereupon, an off-the-record discussion was had at the Bench.)

"THE COURT: I'm going to sustain the objection."

(Emphasis added.)

Contrary to the inference in the prosecutor's question, Tillimon had not previously testified that he indicated he would take a lie detector test. In fact, Tillimon had not testified at trial in any respect about a lie detector test. Tillimon did, however, testify that he had written down all the events of the incident in question, at his attorney's request, the

the night he was arrested. This writing was not admitted into evidence nor was its substance testified to at trial. Tillimon merely stated that he made the writing and gave a copy to his attorney and to the prosecutor. The writing itself is contained in the record as part of the state's response to a discovery request from Tillimon. the writing states:

> "*** The officer said to me 'will you take a lie detector test?' I said 'yes.' *** I said the man (the victim's father] 'should take a lie detector test, too.' But the man did not respons."

It has been held that "*** neither a professed willingness, nor a refusal to submit to *** a [lie detector] should be admitted." State v. Hegel (1964), 9 Ohio App. 2d 12, 13. In Hegel, testimony regarding a lie detector test was admitted over the defendant's objection, and the jury was not admonished to disregard the

testimony. The court of appeals found this to be prejudicial error, reversed the quilty verdict, and remanded for a new trial.

In the instant case, the trial court sustained Tillimon's objections to both the references to a lie detector test, and gave a limiting instruction each time. The first instruction was as follows:

> "THE COURT: Motion will be granted. The testimony that was just given by the witness will be stricked and the jurors will be instructed to disregard it as I have earlier instructed you that I might in the even that a motion to strike was granted."

The second limiting instruction was:

> "THE COURT: All right, the Court has sustained the defendant's objection, and that mean that you will not hear the answer to the question, and the jury is instructed to disregard the question since a question is only important as it lends meaning to an answer, and I have instructed you on that matter already, and at the close of the case I'll instruct you on it again.
>
> "Now, mention has been made of a polygraph examination, and the

Court is not instructing you, the jury, that polygraph examinations are not an issue in this case, and in fact polygraph examinations are not admissible in evidence at a trial. You are to base your decision and your verdict in this case on the evidence that is here presented and admitted at trial and on nothing else, since polygraph examinations are not admissible at trial.

"It is irrelevant for purposes of this trial as to whether an individual does or does not want to take a polygraph examination."

The issue in this assignment of error is whether defendant's motion for a mistrial or motion for a new trial should have been granted because of these references to a lie detector test. A mistrial may be granted, at the discretion of the trial court, State v. Abboud (1983), 13 Ohio App. 3d 62, if an error or irregularity occurs which prejudicially affects the substantial rights of the accused. See, generally, 27 Ohio Jurisprudence 3d (1981) 86, Criminal Law, Section 868. In State v. Holt (1969), 17

Ohio St. 2d 82, 84, the court held, in connection with a witness's comment on the defendatn having taken a lie detector test and failed it:

> "*** Of course, such testimony was highly improper and no doubt damaging to the defendant, but the trial judge promptly instructed the jurors to disregard such remarks and to erase it from their minds. In view of the court's immediate action in this respect, we do not feel justified in holding that the judge's refusal to order a mistrial was prejedicial error."

The facts in the instant case are somewaht different in that it was the prosecutor who mentioned a lie detector test. While we feel that the prosecutor's tactics were highly questionable, in light of the extensive limiting instructions by the court, we cannot say that the defendant's right to a fair trial was substantially prejudiced by the prosecutor's remark. We, therefore, find appellant's first assignment of error not well-taken.

In his second assignment of error,

appellant challenges the trial court's decision that the victim, a seven year old boy, was competent to be a witness against him. Evid. R. 601(A) states:

> "Every person is competent to be a witness except:
> "(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly and;"

The issue of the competency of a witness under the age of ten to testify was addressed in State v. Morgan (1986), 31 Ohio App. 3d 152, where the court stated, at 153-156:

> "The Ohio Supreme Court interpreted this rule [Evid. R. 601 (A)] as meaning that children under age ten are presumptively incompetent to testify. State v. Wilson (1952), 156 Ohio St. 525, 529-530, 46 O.O. 437, 439, 103 N.E. 2d 552, 555; see, also State v. Lee (1983) , 9 Ohio App. 3d 282, 9 OBR 497, 459 N.E. 2d 910. The presumption is rebuttable. Proper judicial procedure requires the trial judge to conduct a voir dire examination of a child under age ten to determine the child's competence to testify. Wilson, supra, at 529. 46 O.O. at 439, 103

N.E. 2d at 555. If the court determines that the child is competent, the child is then permitted to testify.

"***

"The issue of a witness' competence to testify may be likened to other issues of admissibility. See, generally, Evid. R. 104(A). The threshold of admissibility is low, reflecting a policy of favoring the admission of relevant evidence for the trier of fact to weigh as opposed to preliminary admissibility determinations which prevent relevant evidence from reaching the trier of fact at all. See Evid. R. 402. In the same fashion, a child witness' competence to testify is measured by the standard of whether the child is able to receive just impressions of facts and to relate these impressions truly. Evid. R. 601(A). If the child meets that minimal standard, the testimony of the child is received into evidence for the trier of fact to weigh.

"A voir dire examination should consist of questions designed to elicit from the child answers which the court can use to test competence. From the case law it is clear that a child should demonstrate the ability to distinguish truth from falsehood. The child should also be able to reasonably identify the consequences of giving false testimony. *** These considerations form the basis for a competence determination with respect to a child of tender years.

"***

"A trial judge is in a far better position than an appellate court to determine a child's capacity for truth-telling. The judge can observe the child's demeanor, composure, and behavior."
(Footnotes omitted.)

In the instant case, the trial court conducted a voir dire examination of the seven year old witness. The relevant portions of this examination are set forth below.

"THE COURT: Why don't you tell me what your full name is.

"A Antonio Hernandez.

"THE COURT: Okay. And how old are you?

"A Seven.

"THE COURT: Seven. What's your birthday?

"A It's --what?

"THE COURT: When is your birthday?

"A In October, but that's all I know.

"THE COURT: You forget the day?

"A (Nodded affirmatively)

"***

"THE COURT: What grade were you in last year?

"A Kindergarten.

"THE COURT: What grade are you going to be in this next year?

"A I'm not sure if it's going to be second grade or first.

"***

"THE COURT: Okay. And we need to ask you a couple of questions about telling the truth. Do you know what it means to tell the truth?

"A (Nodded affirmatively)

"THE COURT: Waht does it mean to tell the truth?

"A When somebody asks you something to say it's true.

"THE COURT: Well, let me ask you a question like this. You see this robe that I'm wearing?

A (Nodded affirmatively)

"THE COURT: And what color robe is this?

"A Black.

"THE COURT: Black, okay. If I were to say that this robe was white, would I be telling you the truth?

"A (Indicated negatively).

"THE COURT: No. If I told you this robe was white, would that be the truth?

"A No.

"THE COURT: Okay. That would be a lie, wouldn't it?

"A (Nodded affirmatively).

"***

"THE COURT: Okay. And do you understand why it's important to tell the truth?

"A (Nodded affirmatively)

"THE COURT: Why is it important to tell the truth?

"A I'm not sure.

"THE COURT: If somebody asks you a question and they want you to tell the truth, why is it important for you to tell the truth?

"A (Witness shrugged)

"THE COURT: Do your mon and dad teach you about telling the truth?

"A Yeah.

"THE COURT: Okay. And what do they say will happen if you don't tell the truth?

"A Get in trouble.

"THE COURT: Oh, okay. Do you understand what it means if you take an oath, if you swear to tell the truth, if you promise to God to tell the truth? Do you understand what that means?

"A Not really.

"THE COURT: Do you understand what would happen if you didn't tell the truth?

"A (Nodded affirmatively)

"THE COURT: What would happen?

"A Get into trouble.

"THE COURT: Okay. Now, when you come here to talk, do you understand that you need to tell the truth?

"A (Nodded affirmatively).

"THE COURT: Okay. And you understand what would happen if you didn't tell the truth?

"A (Nodded affirmatively)

"THE COURT: What would happen?

"A I'm not sure.

"THE COURT: Well, you said before that if you didn't tell the truth in other cases, like if your mon and dad wanted you to tell the truth and you didn't tell the truth, waht would happen then? What happens when you don't tell the truth?

"A You get in trouble.

"THE COURT: Okay.

"A Sometimes I do. Not all the time.

"THE COURT: Not all the time?

"A Maybe. I don't know.

"THE COURT: Do you get in trouble when somebody finds out you didn't tell the truth?

"A Yeah.

"THE COURT: Do sometimes they don't find out?

"A Well, I don't lie anymore."

We find that the trial court did not abuse its discretion in finding the seven year old boy comptetent to testify. Therefore, we find appellant's second assignment of error not well-taken.

Appellant's final assignment of error alleges that the verdict was against the manifest weight of the evidence.

> "A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense had been proven beyond a reasonable doubt." State v. Eley (1978), 56 Ohio St. 2d 169, syllabus.

The victim testified that he went into the rest room of McDonals's restaurant alone and then the defendant entered the

rest room. The victim stated that the defendant opened the door to the toilets for him because it was struck and that while he used the toilet, the defendant watched. When he was done using the toilet, he went to wash his hands and the defendant said to him, "Let me tuck your shirt." The victim stated that the defendant pulled his, the victim's, pants down, and, "he -- that's when he touched me ***." The victim stated that the defendant touched his penis and butt with his hand. On cross-examination, the victim testified as follows:

> "Q All right. And at that time you said the man -- you tell me what he did then?
>
> "A When he was tucking my shirt in?
>
> "Q Yeah, he was tucking your shirt in?
>
> "A He touched me.
>
> "Q Okay. And your pants were snapped, right?

"A Oh, no, because he pulled them down again.

"Q He pulled them down again?

"A He pulled my underwear and put his hands in my underwear, and he was also pretending he was tucking my shirt in, and then before he left, he pulled my pants back up, but I don't remember him tucking my shirt in that much."

The defendant testified that he never touched the boy but only helped him get into the toilet stall and tucked in his shirt after he came out of the stall.

We find that based on the victim's testimony there was substantial evidence that Tillimon violated R.C. 2907.05 (A) (3) and the verdict was not against the manifest weight of the evidence. Appellant's third assignment of error is not well-taken.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and judgment of the Lucas County Court of common Pleas is affirmed. It

is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

Peter M. Handword, P.J.
PRESIDING JUDGE

Charles D. Abood, J.
CONCUR.
JUDGE

John J. Conners, Jr., J., dissents.

CONNERS, J. I must respectfully dissent. I would find all three assignments of error well-taken, would reverse and remand to the trial court for further proceedings.

THE SUPREME COURT OF OHIO

1989 TERM

To wit: November 15, 1989

State of Ohio, *

Appellee, * Case No. 89-1372

V. *

ENTRY

Duane Tillimon, *

Appellant.

Upon consideration of the motion for leave to appeal from the Court of Appeals for Lucas County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by N. Stevens Newcomer.

(Court of Appeals No. L88253)

THOMAS J. MOYER
Chief Justice

A-20

NO. CR 88-5607

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

STATE OF OHIO,	*	FILED:
Plaintiff,	*	July 26, 1988
vs.	*	JUDGMENT ENTRY OF SENTENCE GRANTING
DUANE JOSEPH TILLIMON,	*	PROBATION
Defendant.	*	

* * *

Defendant present in court with counsel N. Steven Newcomer. Asst. Prosecutor Dean Mandross present on behalf of the State of Ohio on this 26th day of July, 1988.

The Court having considered the report of the Lucas County Adult Probation Department and having afforded the defendant and the defense counsel their rights pursuant to Rule 32 (A) (]) ORC, and upon consderation of all matters set forth in all the statutory criteria for sentencing and other matters pertinent to the sentence which

should be imposed, the defendant is hereby ordered to be committed to the Ohio Department of Rehabilitation and Corrections for a period of one and one-half years; pay costs of prosecution.

It is further ordered that execution of sentence is suspended and the defendant is probated to the Lucas County Adult Probation Department for two years on consdition the defendant be of good behavior, comply with the rules and regulations of the Probation Department, that he serve thirty days in Toledo House of Corrections, that he pay a fine of $1500, that he engage in counseling or psychological therapy until no longer necessary, and that he pay costs of prosecution. Stay of execution on days granted pending filing of notice of appeal. Stay of execution on fine granted until

August 9, 1988. Defendant advised of his rights to appeal pursuant to Criminal Rule 32 (A) (2).

Richard W. Knepper
JUDGE

CR NO. 88-5601

IN THE COMMON PLEAS COURT

OF LUCAS COUNTY, OHIO

State of Ohio,	*	
Plaintiff,	*	Judge Knepper
vs.	*	ORDER BY TRIAL COURT ACCEPTING
Duane Tillison,	*	AND ENFORCING THE JURY'S
Defendant.	*	VERDICT
	*	

* * * * *

FROM THE TRANSCRIPT
PROCEEDINGS AT THE TRIAL:

"THE COURT: All right. All right, the Court having polled the jury and having reviewed the verdict form and the verdict form having been signed by all 12 jurors, the Court finds that the verdict has been reached according to law, and the verdict will be accepted and ordered filed and spread across the records of the Court."

NO. CR 88-5607

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

STATE OF OHIO,	*	Filed
Plaintiff,	*	June 28, 1988
vs.	*	VERDICT
DUANE TILLIMON,	*	
Defendant.	*	

* * * *

THE STATE OF OHIO
vs.
Duane Joseph Tillimon

The Jury empaneled in the above entitled action, having been sworn, well and truly to try, and true deliverance to make between the State of Ohio and

Duane Joseph Tillimon

having been fully advised in the premises, for verdict find and say that, we find the defendant * Guilty of Gross Sexual Imposition, a violation of ORC Section 2907.05(A) (3) as charged in the single count of the indictment.

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*Insert Guilty or Not Guilty.

1. Howard L.Jarnham (sp)
2. James F. Willes
3. Dale B. Jupenhucki (sp)
4. Mary Anne Shull
5. Charles E. Wilson
6. Janet M. Dem (sp)
7. Don Parks
8. Constance A. Morris
9. Susan R. Hanthorn
10. James W. Woodbury (sp)
11. Greig A. Albright
12. Glenn Harris

IN THE COURT OF APPEALS
FOR LUCAS COUNTY, OHIO

Filed: July 7, 1989

State of Ohio	*	Case No.: L 88-253
Appellee	*	NOTICE OF APPEAL TO THE SUPREME
-vs-	*	COURT OF OHIO
Duane Tillimon	*	N. Stevens Newcomer
	*	Supreme Ct. NO:0012978
Appellant		NEWCOMER, MCCARTER
	*	& GREEN
		421 N. Michigan Street
	*	Suite D
		Toledo, Ohio 43624
	*	(419) 255-9100
		Attorney for Appellant
	*	

* * *

Now comes Appellant, Duane Tillimon, by and through his attorney, N. Stevens Newcomer, and gives notice of his appeal to the Supreme Court of Ohio from Order and OPinion issued by the Lucas County Court of Appeals on the 9th day of June, 1989.

The instant case involves a substantial constitutional question.

Respectfully submitted,

By:_____
N. Stevens Newcomer

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal to the Supreme Court of Ohio was hand delivered to the Lucas County Prosecutors Office, Lucas County Courthouse, Toledo, OHio 43624.

N. Stevens Newcomer

IN THE COMMON PLEAS COURT
OF LUCAS COUNTY, OHIO

Filed: August 11, 1988

STATE OF OHIO,	*	Case No. CR 88-5607
Plaintiff	*	Judge Knepper
vs.	*	NOTICE OF APPEAL
DUANE TILLIMON,	*	N. Stevens Newcomer 0012978
Defendant.	*	Counsel for Defendant 421 N. Michigan, Suite A Toledo, Ohio 43624 Telephone: (419) 255-9100
*	*	*

Now comes Defendant, by and through his counsel, and hereby gives notice of his appeal to the Sixth Appellate District of his conviction in the above case for which Defendant was sentenced on July 26, 1988.

Respectfully submitted,

N. Stevens Newcomer
Counsel for Defendant

CERTIFICATION

This is to certify that a copy of the foregoing Notice of Appeal was sent to the Prosecutor's Office, Lucas County Courthouse,

Toledo, Ohio 43624, on this the 21st day of August, 1988.

N. Stevens Newcomer
Counsel for Defendant

IN THE COMMON PLEAS COURT OF
LUCAS COUNTY, OHIO

Filed: July 11, 1988

STATE OF OHIO	*	Case No. CR 88-5607
Plaintiff	*	Judge Knepper
vs.	*	MOTION FOR JUDGMENT OF ACQUITTAL
DUANE TILLIMON	*	
Defendant	*	N. Stevens Newcomer 0012978 Counsel for Defendant 42] N. Michigan, Suite A Toledo, Ohio 43624 Telephone: (419) 255-9100
	*	

* * *

Now comes the Defendant, by and through his attorney, N. Stevens Newcomer, and pursuant to Rule 29 of the Ohio Rules of Criminal Procedure, moves this court for a judgment of acquittal on the basis that the evidence adduced at trial was insufficient to sustain a conviction for the offense of gross sexual imposition..

N. Stevens Newcomer
Counsel for Defendant

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MEMORANDUM

Following the submission of the State's case the Defendant moved for a judgment of acquittal on the basis that the State had failed to establish a prima facie case based on the fact of severe discrepancies in the testimony of the victim. The court overruled this motion and Defendant renewed the motion at the end of the presentation of Defendant's case and again at the end of the prosecution's case in rebuttal. At all junctures the motion was overruled and the matter was submitted to the jury.

On June 29, 1988 the jury returned a verdict of guilty on the single count indictment and the matter was referred to probation pending sentencing.

Based on the arguments and the evidence that was adduced at trial, Defendant would renew hia morion doe jusfmwnr od acquittal pursuant to Rule 29 of the Ohio Rules of

Criminal Procedure.

N. Stevens Newcomer
Counsel for Defendant

CERTIFICATION

This is to certify that a copy of the foregoing Motion and Memorandum was sent to Mr. Dean Mandross, Prosecutor's Office, Lucas County Courthouse, Toledo, Ohio 43624, on this the]]th day of July, 1988.

N. Stevens Newcomer
Counsel for Defendant

CR NO. 88-5607

IN THE COMMON PLEAS COURT
OF LUCAS COUNTY, OHIO

State of Ohio, * Filed
July 11, 1988
Plaintiff, * Judge Knepper
vs. * MOTION FOR A NEW TRIAL
Duane Tillimon *
Defendant. N. Stevens Newcomer
Counsel for Defendant
* Newcomer & McCarter
421 N. Michigan,
* Suite A
Toledo, Ohio 43624
* Telephone: (419)
255-9100

* * * *

Now comes the Defendant, Duane Tillimon, by and through his attorney, N. Stevens Newcomer, and pursuant to Rule 33 of the Ohio Rules of Criminal Procedure moves this court for a new trial.

N. Stevens Newcomer (S)

N. Stevens Newcomer
Counsel for Defendant

MEMORANDUM

I. FACTS

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The Defendant, Duane Tillimon, was charged in a single count indictment alleging gross sexual imposition in violation of Ohio Revised Code §2907.05. The alleged victim was Antonio Gernandez, a child of 8 years of age. The offense occurred in the Northtown Mall which is in the City of Toledo, Lucas County, Ohio, at a McDonald's Restaurant restroom. The victim allegedly was fondled both on his buttocks and on his penis by the Defendant during a very brief encounter when at least two adults and one other child were present.

Following a brief period during which the Defendant could not be found, a confrontation took place between the Defendant and Gaspar Hernandez, the victim's father. While the contents of that conversation are in dispute and there is a dispute as to who was present during the conversation, it was established that the Defendant remained at

the scene, made no attempt to leave, and at all times then and thereafter cooperated with the toledo Police Department in its investigation.

It is also disputed as to whether or not the Defendant's father, Gaspar Hernandez, could have actually seen what he claimed to have seen, i.e., the placing of both hands in the pants of the alleged victim. The Defendant has claimed all along that he was merely tucking in the boy's shirt and that he in no way intentionally touched any erogenous zone of the alleged victim. The victim made some excited utterances to his father and supposedly demonstrated what had happened. However, when he testified he did not indicate that he was touched in the manner described by his father, but indicated that whatever had happened was a passing of the hand over his genital area, which was consistent with the Defendant's testimony that he merely tucked in his shirt and that that could have caused the touching.

It was very evident that the primary concern of the trier of fact was the credibility of two persons, namely, the Defendant Duane Tillimon and the victim Antonio Hernandez. The encounter was extremely brief and it was an encounter that took place in a restroom servicing a very crowded restaurant. Therefore anything tending to focus upon the credibility of the Defendant was of crucial importance in this trial. Because the testimony of the Defendant, Gaspar Hernandez, and Mrs. Hernandez differed on matters that arose some time after the incident, it was necessary for the court to be especially sensitive to matters that are not permissible subjects of inquiry.

On two occasions, once during the State's case in chief and once during the cross-examination of the Defendant, the prosecution directed questions to Gaspar Hernandez and to Duane Tillimon concerning the offer to take a polygraph examination. Mr. Hernandez responsed to a question by the prosecutor by

by saying that he had asked the Defendant to take a polygraph test and that he had refused. An objection was made at that time and the court gave a cautionary instruction to the jury. During the cross-examination of the Defendant, the prosecution asked the Defendant if he had not indicated on his written statement that he was willing to take a polygraph examination. This was obstensibly to show discrepancy between comments made to Mr. Hernandez and Mr. Tillimon's later written statement. This was supposedly solely for impeachment purposes and had nothing to do with the willingness or unwillingness to take the polygraph to demonstrate guilt or innocence.

Following the question to the Defendant an objection was entered and a motion for a mistrial was made based upon that question and the prior question and response by Mr. Gaspar Hernandez relative to the polygraph examination.

II. THE LAW

Pursuant to Rule 33 (A) (4) the Defendant would move for a new trial because the verdict was not sustained by sufficient evidence. It was incumbent upon the State to prove beyond a reasonable doubt the Defendant had "sexual contact" pursuant to the dictates of §2907.05 (A) (3) for the purpose of "sexually arousing or gratifying" himself. The victim's testimony concerning the encounter differs from that of his father who claimed to have witnessed. it. The victim indicated that his trousers were pulled all the way down and that he was fondled on his buttocks and his penis directly. His earlier statement to the investigation officer indicated that he had been fondled through his underwear. Furthermore, the testimony of the victim's father indicated that he saw the Defendant with both hands inside the victim's pants as if he were "tucking in his shirt". Regradless of the nature of the act itself, it all took place within a very brief period of

time.

When the victim testified as to how he was fondled he was unable to demonstrate initially and could only demonstrate after being prompted by the prosecutor during re-direct examination. Based upon the testimony of the Defendant who indicated that he was only tucking in his shirt, the testimony of Gaspar Hernandez who corroborated the testimony of the Defendant in the fact that he also told the investigating officer that it looked like he was "tucking in his shirt", and the discrepancies between the testimony of the father and the son, the Defendant would say that as a matter of law that the evidence was not sufficient to sustain a verdict.

Defendant further urges that he is entitiled to a new trial pursuant to Ohio Rule of Criminal Procedure 33(A) (1) and (5). Inasmuch as the entire conviciton rests upon whether or not the Defendant was attempting to sexually gratify himself by a touching of the victim, the credibility of the Defendant

is of paramount importance. It is well established that the results of lie detector tests are universally recognized not to be admissible in evidence by either a Defendant or the prosecution for the purposes of establishing the innocence or guilt of the accused. State v. Hagal, 9 Ohio App. 2d 12 (2d Dist. 1964). Since such a test is uniformly held not to be judicially acceptable, it follows that neither a professed willingness nor refusal to submit to such a test should be admitted. Id., at 668.

"Evidence that the accused or a witness has taken a polygraph test is inadmissible." United States v. Brevard, 739 F 2d 180, 182 (4th Cir. 1984). The court may, when an impermissible reference to a polygraph test has been interjected, attempt to cure the error by striking the evidence and instructing the jury to disregard it. Id., at 182.

> [There are instances where the jury is exposed to inadmissible evidence which could make such a strong impression that instructions to disregard it may not remove its prejudicial effect." Id., at 182.

There are two questions to consider in determinint whether a curative instruction or a mistrial is appropriate after a reference to a polygraph test: (1) whether an inference about the result of the test may be critical in assessing the witness' credibility, and (2) whether the witness' credibility is vital to the case. Id., at 182.

The Defendant in the Brevard case had to prove his innocence in the fact of conflicting evidence. Id., at 180. Also, there were two references to the Defendant taking a polygraph test in Brevard. Id., at 180. The court found the remarks about the polygraph test prejudiced the Defendant whose credibility was crucial to determining his innocence or guilt. Id., at 180. The prejudice was found even though at trial the court ordered the jury to disregard the remarks pertaining to the polygraph test. Id., at 180.

The Brevard case is analogous to the case at hand. On two instances the prosecution made remarks concerning Mr. Tillimon's

willingness or unwillingness to take a polygraph examination and the crucial factor in the tillimon matter was the credibility of Mr. Tillimon. The prosecution undoubtedly wanted to attach Mr. Tillomon's credibility and what better way than to indicate there was a discrepancy between his testimony and the testimony of others as to the taking of a polygraph examination.

The obvious inference about unwillingness to take a polygraph test is that the Defendant has something to hide by refusint to take the test. Someone who has something to hide obviously casts doubt on his credibility. It is reasonable to believe that a member of the jury would wonder why the defense objected to the polygraph tests being mentioned in court if in fact the Defendant were willing to take the test. The objection and the unavoidable emphasis on the polygraph because of the instructions of the court inevitably tend to lead the jury to believe that his testimony would not have been corroborated by the polygraph test results.

Secondly, because Mr. Tillimon's credibility is vital to this case and that the only

other testimony came from persons who were also interested parties. The inference that Mr. Tillimon was unwilling to take a polygraph test would tend to persuade the jury to resolve any conflicts in testimony against Mr. Tillimon.

The other factor that enters into questions of credibility is the innuendo about Mr. Tillimon's sexual preferences that permeated the cross-examination of Mr. Tillimon and the remarks made in closing by the prosecution; the obvious inferences that a single man must undoubtedly have some unacceptable sexual preferences. This, coupled with the impermissible attack on Mr. Tillimon's credibility through questioning concerning polygraph examinations was a very potent force in persuading the jury to return a verdict of guilty.

III. CONCLUSION

Defendant would urge that the evidence was insufficient to sustain the verdict reached

by the jury. That insufficiency is more than summed up by the statement that was made by Antonio Hernandez to the investigating officer, Detective Wilbur. The statement is as follows:

> I told my dad he did it but I am really not sure.

The testimony of those persons who were present would belie the conclusion that a person who was attempting to sexually gratify himself would do it in front of two other adult witnesses and another child witness in an area in which anyone could walk in at any moment. The evidence simply did not rise to that level that permitted the jury to come to the conclusion that the Defendant was guilty beyond a reasonable doubt. On that basis a new trial should be granted because the verdict was not sustained by sufficient evidence.

Further, the key factor in this particular trial was the Defendant's credibility.

The impermissible references on two occasions to polygraph examinations, one of which was made directly to the Defendat, so compromised the jury's ability to arrive at a fair and impartical verdict that no curative instruction could remove the taint given by that area of questioning. References to the polygraph were made knowingly and the prejudicial effect is obvious.

Based upon the insufficiency of the evidence and the impermissible questioning regarding the willingness or unwillingness to take a polygraph examination dictates that the Defendant should be granted a new trial pursuant to Rule 33 of the Ohio Rules of Criminal Procedure.

N. Stevens Newcomer (S)

N. Steven Newcomer
Counsel for Defendant

CERTIFICATION

This is to certify that a copy of the foregoing Motion and Memorandum was sent to Mr. Dean Mandross, Prosecutor's Office, Lucas County Courthous, Toledo, Ohio 43624,

on this the 11th day of July, 1988.

N. Stevens Newcomer (S)

N. Stevens Newcomer
Counsel for Defendant

NO. CR 88-5607

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

STATE OF OHIO,	*	FILED
Plaintiff,	*	May 1, 1988
vs.	*	INDICTMENT
DUANE TILLIMON,	*	
Defendant.		

* * *

INDICTMENT

THE STATE OF OHIO,)
Lucas County,) SS.

Of the January Term of 1988, A.D.

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present the DUANE JOSEPH TILLIMON, on or about the 19th day of March, 1988, in Lucas County, Ohio, did have sexual contact with Antonio Hernandez, not his spouse, the said Antonia Hernandez being less than thirteen

(13) years of age, in violation of §2907.05 (A) (3) of the Ohio Revised Code, being a felony of the third degree, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Anthony G. Pizza (S)

Anthony G. Pizza
Lucas County Prosecutor

OHIO STATUTES UNDER WHICH PETITIONER WAS PROSECUTED

Ohio Revised Code provides in parts here material:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender, or cause two or more other persons, to have sexual contact when any of the following apply:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.
>
> (2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other persons', judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.
>
> (3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.
>
> (B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth

degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.